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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 581

WILLIAM W. BURNS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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Opinions Below

No opinions were written in support of the judgment of conviction in the Court of Common Pleas of Hamilton County, Ohio (App. A 23-24),[1] the judgment of affirmance of the Court of Appeals, First Appellate District, Hamilton County, Ohio (App. A 24-25), and the refusal by the Supreme Court of Ohio, through its Clerk, to docket, without prior payment of the docket fee, the motion for leave to appeal, notice of appeal and the motion to proceed in forma pauperis with supporting affidavit (App. A 29-30).

[1] The record in this case is short and is included herein as Appendix A, *infra*, pp. 23-31, instead of being separately printed.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The petitioner contends that a statute of the State of Ohio, as here applied, is invalid because it is repugnant to the Fourteenth Amendment of the Constitution of the United States and that rights guaranteed by that Amendment have been violated.

By letter dated December 3, 1957, the Supreme Court of Ohio refused, through its Clerk, to docket petitioner's motions for leave to appeal and to proceed in forma pauperis, notice of appeal, and supporting affidavit. Within ninety days thereafter, as required by Rule 22(1) of this Court, on January 31, 1958, the petitioner filed in this Court a petition for certiorari and a motion for leave to proceed in forma pauperis, with affidavit of poverty. On December 15, 1958, this Court granted certiorari and leave to proceed in forma pauperis. (App. A 30). On January 26, 1959, the Court modified the order, limiting the review in this Court to the question presented on page 2 of the petition for certiorari (App. A 31).

Constitutional Provisions, Statutes, and Rules Involved

The texts of the relevant sections of the Constitutions of the United States and of Ohio, of the Revised Code of Ohio, and of the Rules of Practice of the Supreme Court of Ohio are set out in Appendix B, *infra*, pp. 32-38.

Question Presented

Where the State of Ohio gives to every defendant the right to move the Supreme Court of Ohio for leave to appeal from a judgment of the intermediate court of appeals affirm-

ing his conviction of a felony, upon payment of a docket fee in the Supreme Court, and

Where the petitioner, who is indigent and unable to pay the docket fee, was denied the right to docket or file in the Supreme Court his motions for leave to appeal in forma pauperis, with supporting papers, solely because he had not paid the fee,

Did such action by the Supreme Court of Ohio withhold from petitioner the due process of law and the equal protection of the laws guaranteed to him by the Fourteenth Amendment?[2]

Statement

The petitioner was convicted by a jury in the Court of Common Pleas, Hamilton County, Ohio, of the crime of burglary of an inhabited dwelling, without a recommendation of mercy. He was sentenced by the court to life imprisonment (as Section 2907.09 of the Ohio Revised Code (App. B 35) directs) in the Ohio State Penitentiary at hard labor but without solitary confinement[3] (App. A 23). Upon appeal, the Court of Appeals, First Appellate Dis-

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[2] The petition for certiorari (p. 2) stated the question as follows: "Whether in a prosecution for Burglary, the *due process clause, and the equal protection clause*, of the Fourteenth (14) Amendment to the United States Constitution are violated by the refusal of the Supreme Court of Ohio, to file the aforementioned legal proceedings, because Petitioner was unable to secure the costs."

The same question appears to be involved in *Beard* v. *State of Ohio*, Misc. No. 69, October Term, 1958, now pending before this Court on petition for certiorari.

[3] He was also convicted on another count of larceny of $800 and was sentenced for one to seven years in the State Penitentiary at hard labor without solitary confinement, this sentence to run concurrently with the life sentence (App. A 24).

trict, Hamilton County, Ohio, on August 26, 1953 affirmed the judgment of conviction, stating, however, that the Court was "of the opinion that there was (sic) reasonable grounds for this appeal" (App. A 24-25).

On or about December 1, 1957,[4] the petitioner, acting on his own behalf, presented to the Supreme Court of Ohio a motion for leave to proceed in forma pauperis with supporting affidavit, a motion for leave to appeal, and a copy of a notice of appeal filed in the Court of Appeals (App. A 25-29). The motion for leave to appeal asserted that the judgment against petitioner "was rendered upon error" and that it is "prejudicial to Appellant" "conflicting with his Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article 1, Section 10 of the Constitution of the State of Ohio" (App. A 26). On December 3, 1957, the Clerk of the Supreme Court of Ohio mailed a letter to petitioner reading as follows (App. A 29-30):

> "This will serve to acknowledge receipt of your motion for leave to proceed in forma pauperis, motion for leave to appeal and notice of appeal.
>
> "We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the rules of practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of a docket fee. For that reason we cannot honor your request.
>
> "We are returning the above mentioned papers to you herewith."

[4] This date is approximate, but it is clear that the date was between November 30 and December 3, 1957. The affidavit of poverty was executed on November 30, 1957 (App. A 28-29) and the letter of the Clerk of the Supreme Court of Ohio, acknowledging receipt, was dated December 3, 1957 (App. A 29-30).

The petition for writ of certiorari was filed on January 31, 1958. Certiorari was granted on December 15, 1958, and on January 26, 1959, the grant was modified to limit the question on certiorari to that stated above (App. A 30, 31).

Summary of Argument

I. Petitioner, a prisoner without funds to pay court costs, applied to the Ohio Supreme Court for leave to appeal the judgment affirming his conviction of a felony, as was his right under Section 2 of Article IV of the Constitution of Ohio and Sections 2953.02 and 2953.08 of the Ohio Revised Code. His papers were rejected by the Ohio Supreme Court because he had not paid the Clerk of that court a docket fee of $20, despite his uncontroverted affidavit that he was unable to pay by reason of poverty. This denial of petitioner's appellate rights followed the consistent practice of the Ohio Supreme Court, as embodied in its rules, based on its strict and rigid construction of Section 2503.17 of the Ohio Revised Code, relative to the payment of a fee.

II. This action plainly contravenes the principle established by *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958), that constitutional rights guaranteed by the Fourteenth Amendment are denied if a State allows all convicted defendants to have appellate review except those who are unable to pay the costs in advance. The circumstances that the petitioner was deprived of an opportunity to seek leave to appeal, instead of an appeal as of right, and that the docket fee he could not pay was relatively small in amount, cannot serve to exclude this case from the principle of *Griffin* and *Eskridge*. Discrimination is equally invidious whether a convicted defendant, solely because of poverty, be deprived of an appeal or of other rights affecting appellate review,

and whether the cost he cannot pay be large or small in amount. The deprivation suffered by the petitioner for his poverty—the denial of access to the Supreme Court of Ohio for a possible further review of his conviction—was not insubstantial, as relevant figures illustrate.

This Court should hold that the Supreme Court of Ohio may not, under the Fourteenth Amendment, withhold access for an appeal from the petitioner on the ground that he is unable to pay the docket fee imposed generally and that petitioner must be accorded the same appeal rights in forma pauperis as are accorded to those who can pay the costs of appeal.

ARGUMENT

I.

Although Ohio Law Accords to Every Person, Whose Conviction of a Felony Has Been Affirmed by a Court of Appeals, the Right to Move for Leave to Appeal to the Supreme Court of Ohio, the Petitioner Was Not Permitted to Exercise This Right by That Court Because He Was Unable by Reason of Poverty to Pay a Docket Fee.

The Constitution of Ohio (Article IV, Section 2, App. B 32) confers upon the Supreme Court of Ohio appellate jurisdiction, *inter alia*, "in all cases involving questions arising under the constitution of the United States or of this state," and "in cases of felony on leave first obtained."[5]

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[5] These provisions defining the Supreme Court's jurisdiction were incorporated in the Constitution in 1912. See *State* v. *Mansfield*, 89 Ohio St. 20, 22, 104 N.E. 1001 (1913). The Supreme Court itself was established by the Constitution of 1802 (Art. III, Sec. 1). Some form of appellate review of criminal cases has been provided by statute in Ohio since 1803. See the history of the Supreme Court and other appellate courts contained in Harris, *Appellate*

In implementation of this, Section 2953.02 of the Ohio Revised Code (App. B 35-36) provides that judgments of the Court of Appeals "in conviction of a felony" and "involving the constitutionality of a statute" "may be reviewed by the supreme court." And Section 2953.08 (App. B 37) prescribes, with respect to the Supreme Court, that an appeal in a criminal case shall not be filed—

> "except upon good cause shown, upon motion and notice to the prosecuting attorney and the attorney general, as in civil cases, or unless such motion is allowed by the supreme court. In cases involving questions arising under the constitution of the United States, or of this state, such leave is not necessary."*

Under Section 2505.04 of the Revised Code (App. B 34) the appeal to the Supreme Court is perfected when a written notice of appeal has been filed with the Court of Appeals, or, if leave to appeal must first be obtained, when the notice of appeal is filed also in the Supreme Court, and no further steps are required to give the Supreme Court jurisdiction over the appeal. *State* v. *Nickles*, 159 Ohio St. 353, 50 Ohio Ops. 322, 112 N.E.2d 531 (1953). See also Sections 2953.04 and 2953.06 (App. B 36) containing directions relating to subsequent procedure in the review of criminal cases.

Courts and Appellate Procedure in Ohio (1933), pp. 13-25. And cf. *Hess* v. *State*, 5 Ohio 1 (1831); *Wagner* v. *State*, 42 Ohio St. 537 (1885); *State* v. *Budd*, 65 Ohio St. 1, 60 N.E. 988 (1901); *Mitchell* v. *State*, 78 Ohio St. 347, 85 N.E. 561 (1908).

* This section, which is Section 13459-7 of the General Code, by its terms imposes no limit on the time when an application for leave to appeal, or an appeal, to the Supreme Court, may be filed. The Supreme Court of Ohio apparently construes it as imposing no time limit, taking the view that the time limit prescribed for civil cases has no application to criminal cases. *State* v. *Grisafulli*, 135 Ohio St. 87, 19 N.E.2d 645 (1939). Under earlier similar statutes the decision was the same. *Miller* v. *State*, 73 Ohio St. 195, 76 N.E. 823 (1906); *Blackburn* v. *State*, 22 Ohio St. 581 (1872) (application for writ of error in Supreme Court about nine years after judgment of lower court not too late).

These provisions of the Ohio Constitution and Revised Code establish that every person, who has been convicted of a felony and who has had his conviction affirmed by a Court of Appeals,[7] has the right to move the Supreme Court of Ohio for leave to appeal and to have that Court decide whether the motion is based on good cause and should be allowed.[8] If the case involves questions arising under the Constitutions of the United States or of Ohio, he may appeal as of right without the necessity of obtaining leave. Not only is this plain from the constitutional and statutory language itself but such an understanding is implicit in the decisions of the Ohio Supreme Court. See, *e.g.*, *Luff* v. *State*, 117 Ohio St. 102, 157 N.E. 388 (1927),[9] and *State* v. *Nickles*, 159 Ohio St. 353, 357, 50 Ohio Ops. 322, 324, 112 N.E.2d 531, 534 (1953).

Notwithstanding that the Constitution and Revised Code accord to all convicted felons generally, whose conviction

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[7] The Supreme Court has no jurisdiction to take appeals directly from the Court of Common Pleas without an intermediate review by the Court of Appeals under Sections 2 and 6 of Article IV of the Ohio Constitution (App. B 32). *Eastman* v. *State*, 131 Ohio St. 1, 1 N.E.2d 140 (1936), app. dismissed, 299 U.S. 505 (1936); cf. *Rehfeld* v. *State*, 102 Ohio St. 431, 131 N.E. 712 (1921). It also has no jurisdiction to review convictions of misdemeanors unless the case involves a constitutional question. *State* v. *Mansfield*, 89 Ohio St. 20, 104 N.E. 1001 (1913).

[8] Cf. 2 Ohio Jur. 2d 785 [Appellate Review, Sec. 178] (1953), which states:

> ". . . there is little or no doubt that an accused has a right of appeal on questions of law under the present Constitution and statutes."

[9] Luff, convicted of a felony, secured three reviews by the Supreme Court, the first (112 Ohio St. 102, 146 N.E. 892 (1925)) and second (113 Ohio St. 379, 149 N.E. 384 (1925)) on leave granted to appeal pursuant to motion, and the third on appeal as of right because a constitutional question was alleged (117 Ohio St. 102, 157 N.E. 388 (1927)). It is of interest to note that in the third opinion the Supreme Court reconsidered and decided again the constitutional question which it had decided in the first opinion.

has been affirmed by the Court of Appeals, the right to seek a review of the conviction in the Supreme Court of Ohio, the opportunity to take advantage of the right is denied by the Supreme Court to those who are too poor to pay a docket fee in advance. Section 2503.17 of the Revised Code (App. B 33-34) provides, *inter alia*, for the payment of a fee of $20 in each case where appeal proceedings are filed as of right or where a motion for leave to appeal is entered, and states that "Such fees *must be paid* to the clerk by the party invoking the action of the court, *before the case or motion is docketed.*"[10] (Emphasis added.) Rules VII and XVII of the Rules of Practice of the Supreme Court of Ohio (App. B 37, 38) state respectively that "In felony cases, where leave to appeal is sought, a motion for leave to appeal shall be filed with the Clerk of the Court along with a copy of the notice of appeal which was filed in the Court of Appeals, upon payment of the docket fee required by Section 2503.17, Revised Code," and that "The Docket Fees fixed by Section 2503.17, Revised Code, must be paid in advance."

As the Statement above shows, the petitioner in the present case applied for a review by the Supreme Court of Ohio of his conviction of a felony, which had been affirmed by the Court of Appeals, in accordance with his clear right under Ohio law. He sent to the Ohio Supreme Court the papers necessary to give that Court jurisdiction to decide whether his appeal was based on good cause and should be allowed: namely, motions for leave to appeal in forma pauperis with supporting affidavit and a copy of the notice of appeal filed

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[10] In the absence of a statutory provision authorizing collection of his fee in advance, a clerk of an Ohio court cannot refuse to receive and file a pleading or other paper presented to him because a litigant fails or declines to prepay the filing fee fixed by statute. *State ex rel. Judson* v. *Coates*, 8 Ohio N.P. 682, 11 Ohio Dec. 670 (1901); *State ex rel. Bennett* v. *McCafferty*, 6 Ohio N.P. New Series 558, 15 Ohio Dec. 415 (1905).

in the Court of Appeals. The Supreme Court, acting through its Clerk,[11] refused to docket or file these papers and returned them to petitioner forthwith, not on the ground that they were inadequate to invoke the Court's jurisdiction, or were insufficient in any way or were improperly prepared, or that petitioner was not in fact indigent, but simply because petitioner did not pay in advance the docket fee which is called for by statute and the Court's rules (App. A 29-30).

Thus, in this case the Ohio Supreme Court in effect construed Section 2503.17 of the Revised Code and its Rules VII and XVII as authorizing no exemption from payment of the docket fee in the case of indigent persons, such as the petitioner, who seek leave to appeal in forma pauperis, and this appears to be its consistent practice.[12] This con-

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[11] The Clerk is a ministerial officer who acts for the Court in carrying out its instructions. In the absence of instructions to the contrary, it is the Clerk's duty to accept any paper presented for filing, provided it is not scurrilous or obscene, is properly prepared, and is accompanied by the requisite filing fee. *State ex rel. Wanamaker* v. *Miller* (two cases), 164 Ohio St. 174 and 176, 57 Ohio Ops. 151 and 152, 128 N.E.2d 108 and 110 (1955), mandamus denied sub nom. *Wanamaker* v. *Supreme Court of Ohio*, 350 U.S. 881 (1955). See also *State ex rel. McKean* v. *Graves*, 91 Ohio St. 23, 109 N.E. 528 (1914).

[12] The United States Court of Appeals for the Sixth Circuit has on at least two occasions, see *Dolan* v. *Alvis*, 186 F.2d 586 (1951), cert. denied, 342 U.S. 906 (1952); and *Bowman* v. *Alvis*, 229 F.2d 730 (1955), decided that a petition for writ of habeas corpus may be prosecuted in the federal courts by a convicted prisoner in Ohio who was denied access to the Supreme Court of Ohio for an appeal because he could not pay in advance the docket fees. In the *Bowman* case, the Court said (p. 731):

> "Such counsel [for the convicted defendant] was appointed and has now presented a Memorandum which fairly indicates that there is no provision in the Rules of Practice of the Ohio Supreme Court for an indigent prisoner to file an appeal to such court without paying the docket fee and the costs of the action, and that a pauper's affidavit addressed to that

trasts with the more liberal view taken by the Court in earlier days. Cf. *Robinson* v. *Kious and Rowe*, 4 Ohio St. 593 (1855); *Heffner* v. *Scranton*, 27 Ohio St. 579 (1875).[13]

Doubtless one of the principal reasons originally for the requirement for prepayment of the docket fee was to assure that the Clerk of the Supreme Court would receive compensation for his services, cf. Section 2503.17(A) of the Revised Code (App. B 33-34).[14] However, the Clerk is now paid by salary and no longer is dependent on fees for

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court is not acceptable. *It is, therefore, the view of this court that the Ohio Supreme Court does not provide an adequate remedy for the prosecution of an appeal from the State courts of Ohio* and its failure so to provide gives the District Court of the United States jurisdiction to entertain a writ for habeas corpus and that upon its denial there is sufficient probable cause for an appeal therefrom." (Emphasis added.)

(The writ of habeas corpus was later discharged. See *Bowman* v. *Alvis*, 224 F.2d 275 (1955), cert. denied, 350 U.S. 949 (1956).)

[13] In *Robinson* the Court construed a statute, which in terms required the payment of jury fees before judgment could be rendered on the jury's verdict, as not authorizing the trial court to withhold the rendition of judgment until the fees were paid, in the face of another statutory provision providing for entry of judgment immediately upon a verdict. *Heffner* decided that the trial court could not condition its order granting a new trial, to which the litigant had been found to be entitled, on the prior payment of costs. The Supreme Court there said (p. 584):

". . . , it would be an unwise exercise of justice to deprive a man of his legal right to a new trial because he was unable to pay for it."

[14] At one time some, if not all, of the clerks of Ohio courts were compensated not by salary, but by the fees collected for particular duties performed. However, with the increase in litigation over the years the fees, to which clerks were entitled, produced such excessive compensation that fixed salaries for the clerks were substituted, without affecting the duty to collect fees. See *State ex rel. Coates* v. *Cuyahoga County*, 22 Ohio C.C. 57, 59, 60, 12 Ohio C.D. 236 (1901); *State ex rel. Judson* v. *Coates*, 8 Ohio N.P. 682, 11 Ohio Dec. 670 (1901). Cf. *Bean* v. *Patterson*, 110 U.S. 401 (1884).

his compensation.[15] The former urgency for the collection of the fee thus does not obtain at the present time, and it would seem that, from the Court's standpoint, there can be no practical reason for not waiving the fee in the case of an indigent.

II.

The Denial of Appeal Rights in the Supreme Court of Ohio Solely Because Petitioner Was Unable by Reason of Poverty to Pay the Docket Fee Deprived Petitioner of the Due Process of Law and Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.

As Point I of this Argument shows, the Supreme Court of Ohio deprived petitioner, because he was indigent, of the right, accorded to those who can pay the docket fee, to have the Court consider his motion for leave to appeal on its merits. Stated another way, he was denied access to the Supreme Court of Ohio solely because he was poor. Discrimination and inequality of this kind are condemned by *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958), as a violation of the due process and equal protection clauses of the Fourteenth Amendment. See also *Ross* v. *Schneckloth*, 357 U.S. 575 (1958).

Griffin and *Eskridge* were concerned with whether transcripts at public expense could, consistently with the Fourteenth Amendment, be denied to poor persons having a right of appeal from a conviction of crime, but the *rationale* of those decisions requires in the case of an indigent the waiver of appellate filing fees—if not all court costs—

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[15] The Supreme Court of Ohio now appoints and fixes the compensation of its clerk, who is required to pay over the fees he collects to the state treasury. Secs. 2503.05 and 2503.18, Revised Code (App. B 33, 34).

which are needed to prosecute a motion for leave to appeal, or an appeal.[16] After establishing in *Griffin* (pp. 17-18) that neither a state nor the Federal Government can constitutionally deny to defendants who are unable to pay court costs in advance the right to plead not guilty, to defend themselves in court, and to have a fair trial, the opinion of Mr. Justice Black continues (p. 18):

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

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[16] See *Barber* v. *Gladden*, 210 Ore. 46, 54, 298 P.2d 986, 990 (1956), in which the Supreme Court of Oregon interpreted *Griffin* as requiring it to waive the statutory requirement of an appeal bond, and the payment of fees in that Court, in the case of an indigent appellant in a habeas corpus action. Cf. also *State* v. *Delaney*, 67 Ore. Adv. Sheets 411, 332 P.2d 71 (1958). And see *People* v. *Pride*, 3 N.Y.2d 545, 170 N.Y.S.2d 321, 147 N.E.2d 719 (1958), holding on the basis of *Griffin* that a state statute requiring, upon the filing of an appeal, prepayment of a court fee to secure a "return," i.e., a report of the trial by the trial judge, violated an indigent's constitutional rights and that the fee must be waived in such a case. In *United States ex rel. Marcial* v. *Fay*, 247 F.2d 662, 665 (2d Cir. 1957), the Court said:

> "'. . . We take these decisions [*Griffin* and *Johnson* v. *United States*, 352 U.S. 565 (1957)] as indicating that the Constitution requires that poor defendants must be afforded the same opportunity to secure review of their convictions as are available to those who can afford to pay the necessary costs and expenses of an appeal. . . ."

See further Qua, *Griffin* v. *Illinois*, 25 Univ. Chi. L. Rev. 143, 148 (1957):

> ". . . I should therefore expect that the rule of the *Griffin* case would apply to cash outlay for appeal papers, such as printing or typing, when required (perhaps including a reasonable sum for briefs), cost of appeal bonds, entry fees in the appellate court, officers' fees for the service of process, if any, and any other similar cash charges. . . ."

And Comment, *The Effect of Griffin* v. *Illinois on the States' Administration of the Criminal Law*, 25 Univ. Chi. L. Rev. 161, 170 (1957).

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran* v. *Kansas*, 316 U.S. 255, 257; *Frank* v. *Mangum*, 237 U.S. 309, 327." [17]

It thus is clear that the Fourteenth Amendment forbids the discrimination involved in requiring the indigent petitioner to pay a filing fee, which he cannot pay, as a condition precedent to allowing him access to the Ohio Supreme Court.

The petitioner's case cannot be excluded from the principles set forth in *Griffin* and *Eskridge* on the ground that

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[17] Cf. *State* v. *Brown*, 26 Wash.2d 857, 176 P.2d 293 (1947), in which the Supreme Court of Washington held that its rule requiring payment of a docket fee on pain of otherwise having the appeal dismissed had no application to an appeal in forma pauperis in a capital case. The Court stated (176 P.2d at 297):

> ". . . No rule of this court was ever intended to be an instrument of oppression or injustice or to deprive a litigant of his life, his liberty, or his property without due process of law. This is a fundamental right guaranteed by the supreme law of the land. It would be unthinkable, and abhorrent to judicial reason, to deprive the appellants in the instant case of their day in this court because of the delay of a court reporter. . . . To permit them to hang without hearing their appeals because, as paupers, they were unable to pay a five-dollar filing fee to the clerk of this court is likewise unthinkable. . . ."

Ohio grants only the right to move the Supreme Court of Ohio for leave to appeal and not appellate review as of right, except where a constitutional question is involved.[18] Discrimination against the poor in the assertion of the right to apply for review is at least equally as objectionable as the circumscription of appellate review as of right because of poverty. Furthermore, the denial of the right to ask for review because of inability to pay the filing fee is even less defensible than the denial of a transcript at state expense involved in *Griffin* and *Eskridge*. For here, the State would not be required to expend public moneys to aid the petitioner but only to waive the collection of a $20 filing fee by interpreting the statute in a just and reasonable way.[19]

Again, the fact that the filing fee is small in amount, in relation to the cost of the transcript involved in *Griffin* and

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[18] Cf. *Linger* v. *Jennings*, —— W.Va. ——, 99 S.E.2d 740 (1957), holding (99 S.E.2d at 744) that the *Griffin* case applies to motions for leave to apply for a writ of error as well as to appeals as of right.

[19] In the event that this Court were to hold that the Supreme Court of Ohio must permit petitioner's motion for leave to appeal in forma pauperis to be docketed without payment of the docket fee, and in the event that the Ohio Court were to allow the appeal, it is probable that the question whether the petitioner should be allowed a transcript at public expense will not arise. As its judgment of affirmance states, the Court of Appeals heard the petitioner's appeal to it on a bill of exceptions, transcript and the original papers and pleadings from the Court of Common Pleas (App. A 24-25). It seems likely that the same record could be made available to the Supreme Court of Ohio at little or no additional cost. Indeed, the bill of exceptions (containing the transcript of proceedings in the trial court) is now before this Court as Exhibit G to the petition for certiorari. See petition, pp. 10, 11. Exhibit G is attached to the petition for certiorari in *Edwin Lotz* [a co-defendant of petitioner in the trial court] v. *State of Ohio*, No. 3 Misc., October Term, 1958, cert. denied Dec. 15, 1958. It may be noted, however, that in one case decided since *Griffin*, an Ohio court held that a convicted defendant was not entitled as a matter of law to a bill of exceptions at state expense. *State* v. *Trunzo*, 75 OLA 187, 137 N.E.2d 511 (Ct. of Apps., Cuyahoga County, 1956).

Eskridge, is not a factor which can exclude this case from the *Griffin* rule.[20] The discrimination interdicted in those cases does not depend at all on the amount of the cost. Whether the cost at issue be large or small, the indigent who does not have the funds to pay it is deprived of the right to prosecute an appeal. The result to him in either case is an invidious discrimination based solely on poverty, resulting in the denial of due process and equal protection of the law. There has, of course, been no suggestion that the petitioner was in fact able to pay the $20 fee. His affidavit tendered to the Ohio Supreme Court (App. A 28-29) states on oath that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action herewith presented. Nor does he have collateral, or assets by which he could secure such costs, nor relatives or friends to whom he could look for such assistance in providing such funds."

As the preceding paragraphs suggest, the discrimination against this indigent petitioner is not without real significance. The penalty imposed upon him for his poverty by the action of the Supreme Court of Ohio was the denial of a chance to have a further review of his case and thus denial of the chance to have his conviction reversed and regain his liberty. The worth of this chance cannot be accurately assessed percentage-wise, but enough data are available to indicate that it was substantial. The Clerk of the Supreme Court of Ohio, in letter dated February 16, 1959, written in response to a letter of counsel for the petitioner, advised that in the last ten years 240 motions for leave to appeal in felony cases were filed in the Ohio Su-

[20] In *Carr* v. *Lanagan*, 50 F.Supp. 41 (Mass. 1943), it was held that the requirement of Massachusetts law that a $5 filing fee be paid as a condition precedent to obtaining a writ of error in a criminal case did not violate an indigent's right to equal protection of the laws under the Fourteenth Amendment, in part because the fee was small and was not unreasonable in amount.

preme Court and of these 48 were allowed. The Clerk did not advise how many of the motions for leave were filed by the convicted defendant.[21] But overall there has been about a 20% chance in the past ten years that a motion for leave to appeal in a felony case would be granted. In an effort to arrive at some estimate of the chance of securing a reversal on the merits after leave to appeal has been allowed, counsel for petitioner examined Volumes 144-167, inclusive, of the Ohio State Reports and has set out the results for the years 1945-1957, inclusive, in Appendix C, *infra*, p. 39. This material shows that in this thirteen-year period the Supreme Court heard on the merits 31 cases, in which motions for leave to appeal filed by the convicted defendant in felony cases had been granted, and that 17 of these were affirmed and 14 were reversed.[22] Such figures of course relate only to cases in which the appealing defendant was possessed of sufficient funds to pay the required docket fee,—and other mandatory costs, if any,—in the Ohio Supreme Court. They do not necessarily reflect the chances of having an appeal granted and securing a reversal on the part of an indigent defendant. But there is no reason to suppose that the indigent's chances of success would be less than those of funded defendants.

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[21] There can be no doubt that the State of Ohio filed some of the 249 motions and that leave to appeal was allowed to the State in some of the 48 cases referred to above. For examples, see *State* v. *Robinson*, 161 Ohio St. 213, 53 Ohio Ops. 96, 118 N.E.2d 517 (1954); *State* v. *Geghan*, 166 Ohio St. 188, 140 N.E.2d 790 (1957).

[22] Figures in the past have been comparable. Harris, *Appellate Courts and Appellate Procedure in Ohio* (1938) reports (Table 4, p. 32) that motions for leave to appeal were filed in the Supreme Court in 26 felony cases on the average in a five-year period from July 1, 1926, to June 30, 1931, of which 80.4% were denied (pp. 9, 31). Of the 25 cases in this five-year period in which leave was allowed and the case heard on the merits, 13 were affirmed and 12 were reversed (Table 5, p. 33). These figures, however, apparently do not exclude the cases in which the State was the movant and appellant.

This Court has of course delimited the only question before it on certiorari in its order of January 26, 1959. Whether the Supreme Court of Ohio would ultimately grant or deny the petitioner's motion for leave to appeal, if one were permitted to be docketed without payment of the fee, is outside the confines of that question. Also not before this Court is the question whether the papers which the petitioner tendered originally to the Supreme Court of Ohio (App. A 25-29) are sufficient to show good cause for allowing an appeal. It will be for the Supreme Court of Ohio to decide—at least initially—whether the documents which the petitioner may submit for docketing, if permitted to do so, are sufficient to grant leave for appeal or an appeal as of right. In this connection it cannot be assumed that petitioner will re-submit motions and notice of appeal in the same form as originally. He may be able to elaborate and make more specific his previous allegations and indeed he may even be able to show that a constitutional question is involved,[23] so that he would have an appeal as of right under Section 2953.08 of the Ohio Revised Code (App. B 37).

It should be pointed out also that there is no basis to conclude that an application for an appeal by petitioner could only be based on untenable or frivolous grounds. The Court of Appeals of Hamilton County, Ohio, noted that in its opinion there were reasonable grounds for the appeal to it (App. A 25). It seems wholly likely, therefore, that, if accorded the opportunity, the petitioner will be able to show good cause for an appeal to the Supreme Court of Ohio. Furthermore, although petitioner's applica-

[23] In the motion for leave to appeal originally submitted *pro se* to the Supreme Court of Ohio petitioner stated that "said proceedings and judgement is prejudicial to Appellant; conflicting with his Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article 1, Section 10 of the Constitution of the State of Ohio" (App. A 26).

tion for leave to appeal was tendered originally about four years and three months after his conviction was affirmed by the Court of Appeals, it would seem that petitioner will not be foreclosed by the passage of time from having his motion for leave to appeal, or an appeal, allowed, since no time limit is prescribed for an appeal to the Supreme Court. See fn. 6, *supra*, p. 7. From a realistic standpoint, petitioner's delay in applying originally for leave to appeal can hardly be regarded as unreasonable. He was confined in the penitentiary, was without counsel, and was without funds to retain counsel or to pay the required docket fee. And indeed it was not until after the decision in *Griffin* that the possibility of seeking leave to appeal without prepayment of the docket fee was really opened for the petitioner.

The State in its brief in opposition to certiorari argued that the petitioner was not entitled to a review by this Court, since he had not exhausted his remedies under state law. The argument was probably directed principally, if not entirely, against a review in this Court on the merits. Since certiorari has been limited to the one question already discussed, which does not go to the merits, such an argument may not be renewed. But in any event, it is obvious that the argument has no validity. It is indeed foreclosed by this Court's decisions in *Griffin* and particularly *Eskridge* where the argument was urged by the Attorney General of the State of Washington on brief. The petitioner here attempted to secure leave from the Supreme Court of Ohio to appeal on the merits, but was denied access to the Court for that purpose, solely because of his inability to pay the docket fee. Cf. *Brown* v. *Allen*, 344 U.S. 443, 485-486 (1953). That he exhausted every remedy that was open to him in the Ohio Supreme Court as of that time cannot be gainsaid. See *Dolan* v. *Alvis*, 186 F.2d 586, 587 (6th Cir. 1951), cert. denied, 342 U.S. 906 (1952). Accord:

Daugharty v. *Gladden*, 257 F.2d 750, 754-755 (9th Cir. 1958); *United States ex rel. Marcial* v. *Fay*, 247 F.2d 662, 664-666 (2d Cir. 1957); *United States* v. *Cummings*, 233 F.2d 188 (2d Cir. 1956); *Robbins* v. *Green*, 218 F.2d 192 (1st Cir. 1954); contra, *Willis* v. *Utrecht*, 185 F.2d 210 (8th Cir. 1950), cert. denied, 340 U.S. 915 (1951). Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 457-458 (1958); *Brown* v. *Allen*, *supra*, 344 U.S. at 447-450. If this Court should decide the question in the present case in petitioner's favor, the opportunity to seek a review of his conviction by the Supreme Court of Ohio, despite his poverty, will for the first time be available to him.

Finally, it is worth noting that many jurisdictions in this country today do not exact a filing fee in a criminal case as a condition for allowing a pauper to appeal his conviction. As this Court fully knows, appeals in forma pauperis in criminal cases are allowed very liberally in the federal courts, without prepayment of fees and costs. 28 U.S.C. § 1915; *Johnson* v. *United States*, 352 U.S. 565 (1957); *Farley* v. *United States*, 354 U.S. 521 (1957); *Ellis* v. *United States*, 356 U.S. 674 (1958); Note, *Indigent Litigants' Aid in Federal Courts*, 58 Col. L. Rev. 832, 836 (1958).[24] Many states allow criminal appeals in forma pauperis upon a sufficient showing, without payment of filing or court fees, by statute, rule of court, or by judicial decision. These

[24] In England a convicted defendant applying for leave to appeal to the House of Lords or the Judicial Committee of the Privy Council is relieved from payment of fees and from lodging security for costs. 9 Halsbury's Laws of England (3d. Ed. 1954) 370, 382. Legal aid to the indigent defendant on appeal in criminal cases seems well established in Britain, on a generous scale. See Criminal Appeal Act, 1907, 7 Edw. 7, ch. 23, Secs. 10, 13; Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, ch. 51, Secs. 2(2), 18-23; Costs in Criminal Cases Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2, ch. 48, Sec. 3; cf. Poor Prisoners' Defence Act, 1930, 20 & 21 Geo. 5, ch. 32; Costs in Criminal Cases Act, 1908, 8 Edw. 7, ch. 15. For a general summary see 10 Halsbury's, *supra*, 530, cf. 552-553.

include Arizona, Florida, Georgia, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, North Dakota, Oregon, Utah, and Washington. It is probable that New York and Wyoming should also be included in this category. In addition, statutes in Illinois and South Dakota provide for such appeals without prepayment of fees in capital cases.[25] In Maryland and Oregon, this Court's decision in *Griffin* seems to have provided the incentive for the allowance of appeals in criminal cases without prepayment of costs.

Conclusion

On the basis of the argument here made, petitioner submits that this Court should decide that the construction given by the Supreme Court of Ohio to Section 2503.17 of the Ohio Revised Code and Rules VII and XVII of its Rules of Practice violates rights guaranteed by the Fourteenth Amendment and renders them invalid, to the extent that they require the payment in advance of a filing fee by an indigent person having appeal rights in that Court.

The case should be remanded to the court below with instructions that the petitioner is to be accorded the right to file an appeal as of right, or a motion for leave to appeal with supporting papers, as he may be advised, without prepayment of the docket fee, and that his appeal or application for leave to appeal is to receive the same consideration

[25] For the references furnishing the authority for the data on the States mentioned, see Appendix D, *infra*, pp. 40-41.

as would be accorded to the appeals and applications for leave to appeal of those who pay the docket fee in advance.[26]

Respectfully submitted,

HELEN G. WASHINGTON,
Counsel for Petitioner.

March, 1959.

[26] The petitioner has no doubt that the Supreme Court of Ohio, if given these instructions, will comply with them. If there were a failure to do so, however, this Court clearly would have the power to order that the petitioner be discharged. Cf. *Chessman* v. *Teets*, 354 U.S. 156, 166 (1957); *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 210 (1951). And the Court here may wish to add to its instructions the clause "failing which he shall be discharged," as was done in the two cited cases.

Appendix A

1. JUDGMENT OF CONVICTION:

THE STATE OF OHIO, HAMILTON COUNTY, COURT OF COMMON PLEAS, CRIMINAL DIVISION

No. 63948

Entered
Feb. 27, 1953
Minute 832

THE STATE OF OHIO,

vs.

WILLIAM W. BURNS.

Indictment for Burglary Inhabited Dwelling, Larceny and Receiving or Concealing Stolen Goods.

Enter
/s/ Renner, J.

The Defendant herein having been convicted of Burglary of an Inhabited Dwelling, as charged in the First Count of the Indictment, without a recommendation of Mercy, and Larceny as charged in the Second Count of the Indictment, Value assessed at Eight-Hundred ($800.00) Dollars, was this day brought before the Court and being informed of the verdict of the Jury, was inquired of if he had anything to say why Judgement should not be pronounced against him and having nothing further to say than he hath already said.

It is therefore Ordered and Adjudged by the Court that the Defendant William W. Burns, on the charge of Burglary of an Inhabited Dwelling contained in the First Count of the Indictment, be imprisoned and confined in the Ohio State Penitentiary, and kept at hard labor but without solitary confinement for a period of Natural Life.

It is further Ordered and Adjudged by the Court that the Defendant, William W. Burns, on the charge of Larceny contained in the Second Count of the Indictment, be imprisoned and confined in the Ohio State Penitentiary, and kept at hard labor but without solitary confinement for a period of not less than One Year, nor more than Seven Years.

It is further Ordered and Adjudged by the Court that these Sentences run concurrently and that he pay the costs of this Prosecution for which Execution is awarded.

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2. JUDGMENT OF AFFIRMANCE OF THE COURT OF APPEALS:

IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT

HAMILTON COUNTY, OHIO

Entered "E"
Aug. 26, 1953
Min. 105

No. 7738 Judgt. Entry

Enter,

/s/ Matthews P.J.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

EDWIN LOTZ and WILLIAM BURNS,

Defendants-Appellants.

Judgment of Affirmance

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court

finds there is no error apparent on the record in said proceedings and judgement prejudicial to the appellants.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the appellee recover from the appellants, his costs herein expended, taxed at $.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

To all of which appellants, by their counsel, except.

/s/ George Heitzler
Atty. for Appellee

/s/ Harry McIlwain
Atty. for Defendant-Appellants.

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3. Papers Tendered by Petitioner to the Supreme Court of Ohio:

In the Supreme Court of Ohio

Case No. .....
Filed: .....

State of Ohio,

Plaintiff-Appellee,

vs.

William W. Burns,

Defendant-Appellant.

Motion for Leave to Appeal.

Comes now William W. Burns, Defendant-Appellant, and expressly moves and applys for leave to appeal on Questions of Law and Fact of the judgement had in case No. 63948 of the Court of Common Pleas, Hamilton County Ohio, which was affirmed by the First District Court of Appeals on or about July 13, 1953.

Defendant-Appellant is now confined in the Ohio Penitentiary pursuant to the above said judgement, and upon which he contends was rendered upon error, and that said proceedings and judgement is prejudicial to Appellant; conflicting with his Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article 1, Section 10 of the Constitution of the State of Ohio.

Respectfully Submitted.

/s/ William W. Burns
William W. Burns

No. 94272
Ohio Penitentiary.
Columbus 15, Ohio

In the Court of Appeals, First Appellate District
Hamilton County, Ohio

Entered "E" Aug 26, 1953
No. 7738 Judgt. Entry Min. 105
Judgement of Affirmance
/s/ Enter—Matthew P.J.

State of Ohio,
Plaintiff-Appellee,

vs.

Edwin Lotz
William W. Burns
Defendant-Appellants.

Notice of Appeal

William W. Burns who was Defendant in the Court of Common Pleas Hamilton County Ohio, in the above cause, and is the Defendant-Appellant in the Supreme Court of Ohio, gives notice of this his appeal to the Supreme Court of Ohio from the judgement and final order rendered

on the 26th day of August 1953, by the Honorable Court of Appeals in said cause, by the terms of which said Court of Appeals affirmed the judgement of the Common Pleas Court of Hamilton County Ohio, and entered final judgement against William W. Burns the Defendant-Appellant. This appeal is on questions of law and is taken on condition that a motion for leave to appeal be allowed.

Proof of Service:—

I William W. Burns Defendant-Appellant in said appeal, do hereby declare that I have forwarded to the Honorable Court of Appeals First Appellate District of Ohio, a copy of this, my notice of appeal in the Supreme Court of Ohio, on this day of November 30th, 1957.

/s/ William W. Burns
William W. Burns
Defendant-Appellant

In the Supreme Court of Ohio

Case No. .....

Filed. .....

State of Ohio,

Plaintiff-Appellee,

vs.

William W. Burns,

Defendant-Appellant.

Motion for Leave to Proceed in Forma Pauperis.

Comes now William W. Burns, No. 94272, now confined in the Ohio Penitentiary at Columbus Ohio, and respectfully moves the Honorable Court to permit him to proceed with this cause of action in Forma Pauperis.

Defendant-Appellant asserts that he is an indigent person without sufficient funds to pay the Docket Fee and/or Filing

Fee as required by Section 1512 Ohio General Code, and stipulated by Rule XVII of the Rules Of Practice, Ohio Supreme Court.

Therefore Defendant-Appellant respectfully prays that this Court will grant the Motion and permit him to proceed in Forma Pauperis.

Respectfully Submitted.

/s/ William W. Burns
William W. Burns

No. 94272
Ohio Penitentiary
Columbus 15, Ohio

In the Supreme Court of Ohio

Columbus, Ohio

Affidavit.

William W. Burns, respectfully represents to this honorable Court that he is without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action herewith presented.

nor does he have collateral, or assets by which he could secure such costs, nor relatives or friends to whom he could look for such assistance in providing such funds.

Wherefore William W. Burns, respectfully prays that the Honorable Supreme Court of Ohio, will permit him to proceed in Forma Pauperis.

Respectfully Submitted.

/s/ William W. Burns
William W. Burns

Defendant-Appellant.

State of Ohio,
County of Franklin, *ss.*

William W. Burns, being first duly sworn, says that the foregoing statements made by him in this Affidavit are true.

/s/ William W. Burns
William W. Burns—Defendant-Affiant.

Sworn to and subscribed before me in my presence this 30 day of Nov. 1957.

/s/ Saul G. Hudson
Notary Public, Franklin County Ohio.
My Commission Expires Sept. 21 1958.

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4. Letter of Clerk of Supreme Court of Ohio:

Clerk of the Supreme Court of Ohio

Columbus 15

Elliot E. Welch
Clerk

Harold O. Shelton
Irene E. Stalter
John C. McConnell
Deputy Clerks

December 3, 1957

Mr. William W. Burns
94272
Box 511
Columbus 15, Ohio

Dear Sir:

This will serve to acknowledge receipt of your motion for leave to proceed in forma pauperis, motion for leave to appeal and notice of appeal.

We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the rules of practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be

filed in lieu of a docket fee. For that reason we cannot honor your request.

We are returning the above mentioned papers to you herewith.

Yours very truly,

/s/ ELLIOT E. WELCH
Elliot E. Welch
Clerk

is
encls.

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5. ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI—December 15, 1958

SUPREME COURT OF THE UNITED STATES

No. 5 Misc., October Term, 1958

WILLIAM W. BURNS,

Petitioner,

vs.

STATE OF OHIO.

On petition for writ of Certiorari to the Supreme Court of the State of Ohio.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 581.

December 15, 1958

Mr. Justice Frankfurter and Mr. Justice Stewart took no part in the consideration or decision of this motion and application.

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6. ORDER LIMITING GRANT OF CERTIORARI—January 26, 1959

SUPREME COURT OF THE UNITED STATES

No. 581, October Term, 1958

WILLIAM W. BURNS,

Petitioner,

vs.

STATE OF OHIO.

The order of this Court of December 15, 1958, granting the petition for writ of certiorari is modified so as to limit the review in this Court to the question presented on page 2 of the petition for writ of certiorari which reads as follows:

"Whether in a prosecution for Burglary, the Due Process Clause, And The Equal Protection Clause, of the Fourteenth (14) Amendment to the United States Constitution are violated by the refusal of the Supreme Court of Ohio, to file the aforementioned legal proceedings, because Petitioner was unable to secure the costs."

January 26, 1959

Mr. Justice Stewart took no part in the consideration or decision of this case.

Appendix B

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF OHIO 1851, as amended (printed in Appendix to Page's Ohio Revised Code Ann. at p. 345):

• • • • • • •

ARTICLE IV. JUDICIAL

• • • • • • •

"§ 2. *The supreme court.*

" . . . It shall have . . . appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and . . .

"§ 6. *Courts of appeals.*

"The courts of appeals shall have . . . such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders . . . of courts of record inferior to the court of appeals within the district, and . . . judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, . . ."

PAGE'S OHIO REVISED CODE ANNOTATED (1954), effective Oct. 1, 1953:

TITLE XXV [25]

COURTS—APPELLATE

CHAPTER 2503: SUPREME COURT

• • • • • • •

"§ 2503.05 (Supp. 1958) *Appointees of court; compensation.* (GC § 1480-1) [as amended by 126 Laws of Ohio 44, effective July 25, 1955]

"The supreme court may appoint the clerk of the supreme court, the reporter of the supreme court, the administrative assistant of the supreme court, the law librarian, who shall also be the marshal of the court, and such assistants, deputies, clerks, stenographers, and other employees who are necessary for the prompt and efficient discharge of the duties of the offices of the clerk, the reporter, the administrative assistant, and the librarian. All such appointees shall serve at the pleasure of the court.

"The supreme court shall fix the compensation to be paid the clerk, the reporter, the administrative assistant, the librarian, and all assistants, deputies, clerks, stenographers, and other employees, which compensation shall be paid from the state treasury in semimonthly installments upon the approval of the court. . . .

• • • • • • •

"§ 2503.17 *Schedules of fees of clerk.* (GC § 1512)

"The clerk of the supreme court shall charge and collect the following fees:

"(A) For each case entered upon the minute book, including original actions in said court, appeal proceedings filed as of right, . . . for each motion . . . for leave to file a notice of appeal in criminal cases, . . . twenty dollars, which shall be in full for docketing the case, making dockets from term to term, indexing and entering appearances, issuing process, filing papers, entering rules, motions, orders, continuances, decrees, and judgments, making lists of causes on the regular docket for publication each year, making and certify-

ing orders, decrees, and judgments of the supreme court to other tribunals, and the issuing of mandates;

"(B) For filing assignments of error . . . upon allowance of a motion for leave to appeal, or for filing a bill of exceptions upon motion for leave being granted under Section 2945.70 of the Revised Code, five dollars;

• • • • • • •

"Such fees must be paid to the clerk by the party invoking the action of the court, before the case or motion is docketed and shall be taxed as costs and recovered from the other party, if the party invoking the action succeeds, unless the court otherwise directs."

"§ 2503.18 *Fees to be paid into state treasury.* (GC § 1513)

"The clerk of the supreme court shall keep a cash-book in which he shall enter the amounts received by him as fees under section 2503.17 of the Revised Code. He shall make a report to the supreme court each quarter, of the fees received during the preceding quarter, and forthwith pay them into the state treasury."

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CHAPTER 2505: PROCEDURE ON APPEALS

• • • • • • •

"§ 2505.04 *Appeal perfected.* (GC § 12223-4)

"An appeal is perfected when written notice of appeal is filed with the lower court, tribunal, officer, or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. After being perfected, no appeal shall be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

"§ 2505.05 *Notice of appeal.* (GC § 12223-5)

"The notice of appeal required by section 2505.04 of the Revised Code shall designate the order, judgment, or decree appealed from and whether the appeal is on

questions of law or questions of law and fact. In said notice the party appealing shall be designated the appellant, and the adverse party, the appellee, and the style of the case shall be the same as in the court of origin. The failure to designate the type of hearing upon appeal is not jurisdictional and the notice of appeal may be amended by the appellate court for good cause shown.

* * * * * * * *

TITLE XXIX [29]

Crimes—Procedure

* * * * * * * *

Chapter 2907: Offenses Against Property—Generally

* * * * * * * *

[Burglary and Other Breaking]

"§ 2907.09 *Burglary in an inhabited dwelling.* (GC § 12437)

"No person shall in the night season maliciously and forcibly break and enter an inhabited dwelling house with intent to commit a felony, or with intent to steal property of any value.

"Whoever violates this section shall be imprisoned for life. Upon recommendation of mercy by the jury such person shall be imprisoned not less than five nor more than thirty years.

* * * * * * * *

Chapter 2953: Appeals

* * * * * * * *

"§ 2953.02 *Review of Judgments.* (GC § 13459-1)

"In a criminal case, . . . a judgment or final order of a court or officer inferior to the court of appeals may be reviewed in the court of appeals. A judgment or final order of the court of appeals in conviction of a felony, or the court of common pleas in conviction of a felony or misdemeanor, and a judgment of the court of appeals involving the constitutionality of a

statute, or a judgment in a case of public or great general interest, may be reviewed by the supreme court. The supreme court in a criminal case or proceeding, except when its jurisdiction is original, shall not be required to determine as to the weight of the evidence.

• • • • • • •

"§ 2953.04 *Proceedings to review.* (GC § 13459-3)

"Judgments and final orders are reviewed by appeal, instituted by filing notice of appeal with the court rendering such judgment or order and with filing a copy thereof in the appellate court where leave to appeal must be obtained. Upon filing the notice of appeal there shall be filed in the appellate court the transcript and original papers as provided in section 2953.03 of the Revised Code. It is not necessary to include in the transcript of the record any bill of exceptions or objections, but the original bill of exceptions or objections may be attached in lieu of the transcript of the record thereof. The court in which the review is sought, by summary process, may compel a more complete record to be furnished, and such original papers to be forwarded. The brief of the appellant shall be filed with the transcript and shall contain the assignments of error relied on in such appeal. Within fifteen days thereafter, the appellee shall file its brief. All of such proceedings to review such judgment have precedence over all other cases in said reviewing court, and shall stand for hearing on the trial docket of said court from day to day until heard and submitted. . . .

• • • • • • •

"§ 2953.06 *Notice of appeal served upon prosecuting attorney.* (GC § 13459-5)

"Before the filing of a notice of appeal or a motion for leave where leave must first be obtained, a copy thereof must be served upon the prosecuting attorney. Notice of appeal shall contain a description of the judgment so as to identify it, and motions for leave to file shall state the time and place of hearing.

• • • • • • •

"§ 2953.08 *Appeal filed in supreme court.* (GC § 13459-7)

"An appeal shall not be filed in the supreme court except upon good cause shown, upon motion and notice to the prosecuting attorney and the attorney general, as in civil cases, or unless such motion is allowed by the supreme court, or, in capital cases by two judges thereof, or in other cases by one judge thereof. In cases involving questions arising under the constitution of the United States, or of this state, such leave is not necessary."

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO (printed in Page's Ohio Revised Code Annotated following Title XXV [25]):

* * * * * * *

RULE VII

CRIMINAL CASES

"Section 1. *Felony Cases.* In felony cases, where leave to appeal is sought, a motion for leave to appeal shall be filed with the Clerk of this Court along with a copy of the notice of appeal which was filed in the Court of Appeals, upon payment of the docket fee required by Section 2503.17, Revised Code. Copies of such notice of appeal and motion for leave shall be served upon the appellee or his attorney of record, and proof of such service shall be filed with the motion for leave.

* * * * * * *

"Section 4. *Appeal as of Right.* In any criminal case, whether felony or misdemeanor, if the notice of appeal shows that the appeal involves a debatable question arising under the Constitution of the United States or of this state, the appeal may be docketed upon filing the transcript of the record and any original papers in the case, upon payment of the fee required by Section 2503.17, Revised Code.

* * * * * * *

RULE XVII

Docket Fees

"The Docket Fees fixed by Section 2503.17, Revised Code, must be paid in advance. The docket fees are as follows:

"For filing Motion to Certify Record, $20.00. For filing an appeal as of right alleging constitutional question, $20.00. If both above proceedings are filed one fee of $20.00 is sufficient. For filing assignments of error upon allowance of motion to certify record, $5.00. For filing any motion in a pending case, $2.00. For filing any original action in the Supreme Court, $20.00, accompanied by a deposit of $10.00 as security for costs. Deposit as security for costs is required only in original actions."

Appendix C

Felony Cases Which the Supreme Court of Ohio Heard on the Merits on Leave Allowed to the Convicted Defendant With Notation of Result.

State of Ohio versus	Ohio St. Reports Vol.	Page	Year	Affirmed	Reversed
1. Jones	145	137	1945	x	
2. Wildman	145	379	1945	x	
3. Weekly	146	277	1946	x	
4. Petro*	148	473	1947		x
5. Petro*	148	505	1947	x	
6. Salter	149	264	1948	x	
7. Frohner	150	53	1948	x	
8. Cochrane	151	128	1949		x
9. Rosen	151	339	1949		x
10. Abbott	152	228	1949		x
11. Martin	154	539	1951	x	
12. Karcher	155	253	1951		x
13. Farmer	156	214	1951		x
14. Urbaytis	156	271	1951		x
15. Muskus	158	276	1952		x
16. Cimpritz	158	490	1953		x
17. Hetzel	159	350	1953		x
18. Hillman	160	293	1953		x
19. Elfrink	161	549	1954	x	
20. Sharp	162	173	1954		x
21. Hreno*	162	193	1954	x	
22. Rudy	162	362	1954	x	
23. Lawrence	162	412	1954		x
24. Worden*	162	593	1955		x
25. DeNicola	163	140	1955	x	
26. Meyer	163	279	1955	x	
27. Martin	164	54	1955	x	
28. Springer	165	182	1956	x	
29. Sheppard	165	293	1956	x	
30. Kearns	165	573	1956	x	
31. Miclau	167	38	1957	x	

* The reports of these felony cases do not disclose specifically how they came to the Supreme Court but it is assumed that it was by leave granted pursuant to motion, since no constitutional question appears to have been involved.

Appendix D*

States in which by statute, court rule, or judicial decision an indigent convicted defendant, upon a sufficient showing, is allowed to prosecute an appeal without payment of a docket, entry, or filing fee or court costs generally:

Arizona: ARIZ. SUP. CT. R. 19(a) (printed in 17 ARIZ. REV. STATS. ANN. (1956)).

Florida: 24 FLA. STAT. ANN. §§ 924.17, 939.15.
See *Loy* v. *State*, Fla. , 74 So.2d 650 (1954); *State ex rel. Cheney* v. *Rowe*, 152 Fla. 316, 11 So.2d 585 (1943).

Georgia: 6 GA. CODE ANN. (1935) § 6-1702.
Cf. *Oliver* v. *State*, 160 Ga. 365, 127 S.E. 732 (1925).

Kansas: 1957 Supp. to KAN. GEN. STAT. (1949) § 62-1304 (b).

Kentucky: KY. REV. STAT. (1953) § 453.190.
See *Wilson* v. *Melcroft Coal Co.*, 226 Ky. 744, 11 S.W.2d 932 (1928).

Maryland: LAWS OF MARYLAND 1958, ch. 68.
Cf. *Lloyd* v. *Warden of Md. Penitentiary*, 217 Md. 667, 143 A.2d 483 (1958).

Massachusetts: 43 MASS. GENL. LAW. ANN. (1959) c. 262, § 4.
See *Guerin* v. *Commonwealth*, Mass. Adv. Sheets 525, 149 N.E.2d 220, 224 (1958).
Cf. *Carr* v. *Lanagan*, 50 F.Supp. 41 (Mass. 1943).

Missouri: 27 MO. STAT. ANN. (1952), § 483.500.
Cf. *State* v. *Pieski*, 248 Mo. 715, 154 S.W. 747 (1913).

Nebraska: 2A NEB. REV. STAT. (1956), § 29-2306.

New Mexico: 4 N.M. STAT. ANN. (1953), §§ 21-2-1(5) and 21-2-1(22).

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* For certain of the references in this appendix counsel for petitioner is indebted to Messrs. George Padgett, Patrick J. Reardon, John Sanchez, and Ronald Sullivan, of the Georgetown University Legal Aid Society, who volunteered their services.

North Dakota: 3 N.D. Rev. Code (1943), § 29.2818. (This section appears to exempt all criminal defendants from clerk's fees on appeal.)

Oregon: *Barber* v. *Gladden*, 210 Ore. 46, 54, 298 P.2d 986, 990 (1956);
Daugharty v. *Gladden*, 257 F.2d 750, 754 (9th Cir. 1958).

Utah: 8 Utah Code Ann. (1953), § 77-39-12.
Salt Lake City v. *Robinson*, 39 Utah 260, 275, 116 P. 442, 448, 35 Lrans 610, Ann. Cas. 1913E 61 (1911). (Exempts all criminal defendants from payment of clerk's fees.)

Washington: Wash. Rev. Code 1956, § 2.32.080; Wash. Sup. Ct. R. 47 (eff. Jan. 2, 1951).

States permitting this in capital cases only:

Illinois: 38 Smith-Hurd Ill. Ann. Stats. § 769a.

South Dakota: So. Dak. Code 1939, § 32.0203; 1952 Supp., § 34.37A16.

States which probably would waive filing fees in forma pauperis criminal appeals:

New York: *People* v. *Pride*, 3 N.Y.2d 545, 170 N.Y.S.2d 321, 147 N.E.2d 719 (1958);
Cf. *People* v. *Breslin*, 4 N.Y.2d 157, 172 N.Y.S.2d 157, 149 N.E.2d 85 (1958);
United States ex rel. Marcial v. *Fay*, 247 F.2d 662 (2d Cir. 1957).

Wyoming: Wyo. Comp. Stat. Ann. 1945, § 1-202 (1957 Supp.); § 1-407.

FILE COPY

No. 581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Writ of Certiorari to the Supreme Court of Ohio

WILLIAM W. BURNS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT

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IN THE

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WILLIAM W. BURNS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The brief for the petitioner correctly cites the opinions below.

JURISDICTION

Matters of jurisdiction are adequately set forth in the brief for the petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent includes herein additional sections of the Revised Code of Ohio, (Appendix A, p. 11), and a section of the Revised Statutes of Illinois (Appendix B, p. 15),

supplemental to the relevant sections of the Constitution of the United States and of the State of Ohio, of the Revised Code of Ohio, and of the rules of practice of the Supreme Court of Ohio, set out in the brief of petitioner.

QUESTION PRESENTED

Respondent accepts the statement of questions presented as set out in brief for the petitioner.

STATEMENT

The statement appearing in brief for the petitioner is augmented as follows in order that this Court may have before it the full picture:

The defendant, William Burns, has had six indictments returned against him by the grand jury of Hamilton County, Ohio. He pleaded not guilty to all of these indictments at the time of arraignment. William Burns was subsequently tried by jury in the Court of Common Pleas on one of these six indictments which charged in the first count the crime of burglarly of an inhabited dwelling and in the second count the crime of grand larceny. After a nine day trial the jury returned a verdict of guilty of the first count of burglary of an inhabited dwelling without a recommendation of mercy and also returned a verdict of guilty of the second count of grand larceny.

William Burns duly filed a motion for a new trial which motion upon hearing was overruled and final judgment was entered against William Burns. The defendant immediately filed and perfected his appeal to the Court of Appeals, First District, and was supplied with a transcript of the proceedings in the Court of Common Pleas. In the

appellate hearing before the Court of Appeals, William Burns was represented by counsel and a brief was filed in his behalf. The First District Court of Appeals after having heard arguments of counsel and after examination of the written transcript of the record of the proceedings in the Court below and upon due consideration found that there was no error in the trial proceedings and therefore affirmed the judgment of the trial court on August 26, 1953.

On the day the Court of Appeals rendered its judgment, William Burns filed notice of appeal with the clerk of the court, but did not pursue his appeal to the Supreme Court of Ohio on the merits.

In 1955, William Burns filed an application for a writ of habeas corpus in the Common Pleas Court of Franklin County, Ohio, and on March 23, 1955, filed a motion in the Court of Common Pleas of Hamilton County, Ohio, to certify the record of the trial proceedings to the Franklin County Court.

In July, 1957, William Burns filed a motion for dismissal of the outstanding and pending indictments against him in the Hamilton County Court of Common Pleas. This motion was heard and overruled by the Court.

In December, 1957, William Burns mailed certain papers to the clerk of the Supreme Court of Ohio. These papers included a motion for leave to proceed *in forma pauperis* with supporting affidavit, motion for leave to appeal, and a copy of a notice of appeal filed in the Court of Appeals. No copy of the notice of appeal was served on the prosecuting attorney of Hamilton County as required by law. The clerk of the Supreme Court returned the papers to William Burns with a letter which is the basis of this proceeding.

In January, 1958, Burns filed in the Court of Common Pleas, Hamilton County, Ohio, an application for a writ

of habeas corpus and also a motion to quash the outstanding indictments against him. Briefs were filed by both parties and hearing was had by the Court and after due consideration the Court overruled the motion and denied the writ of habeas corpus.

In March, 1958, William Burns filed a petition for a writ of mandamus in the Federal District Court in which he prayed that the outstanding indictments against him be quashed.

In October, 1958, William Burns, filed in the Court of Appeals, First Appellate District, a petition for a writ of mandamus in which William Burns prayed that the outstanding indictments against him be quashed.

In the Supreme Court of the United States certiorari was granted on December 15, 1958, and on January 26, 1959, a grant was modified to limit the question on certiorari.

SUMMARY OF ARGUMENT

1. Petitioner was afforded a transcript of the proceedings in the trial court and an adequate review of those proceedings on appeal. Successive appellate reviews are not a right under the Constitution of the United States.

2. The equal protection of the laws clause of the Fourteenth Amendment to the Constitution does not apply in this case. The same rule applying to the petitioner applies to all others seeking a review in the Supreme Court of Ohio.

ARGUMENT

Petitioner Was Not Denied a Review of his Conviction on Appeal.

This case is not one in which a convicted defendant in a felony case is denied on appellate review of the trial court's proceedings. Such appellate review is available in Ohio to every convicted felon and may be prosecuted *in forma pauperis.*

William Burns, the petitioner, was not only afforded such right of appeal, but availed himself of it. His conviction was thoroughly reviewed on appeal and without cost to him. The courts in the Ohio judicial system affording such appellate review are the ten, three-judge, District Courts of Appeal. On appeal of a criminal case not only may the appellant proceed *in forma pauperis*, but the state may furnish him without cost a transcript of the proceedings in the trial court.[1] Section 2301.23 to 2301.25, Revised Code (App. A. p. 11). If an appeal is taken by the prosecution, the trial court may even appoint a competent attorney to argue the bill of exceptions against the prosecuting attorney or the attorney general, and pay his fee out of the public treasury. Section 2945.69, Revised Code (App. A, p. 13).

What petitioner now wants is not a review on appeal—that he has had—but a second review, or a review of the review—in the Supreme Court of Ohio. Whereas he had the right and exercised his right to appellate review in the Court of Appeals, he had no right to a further review in

1. It is true that in State v. Truzo, 75 O.L.A. 187, an Ohio Court of Appeals held that the furnishing of a free transcript is discretionary with the trial court, but the common practice is to furnish it in case of appeal. The appellate court may order a more complete transcript. (Sec. 2953.04, Revised Code, App. A., p. 13).

the Supreme Court of Ohio. Appeal as a matter of right to the Supreme Court of Ohio is limited to a very narrow field of cases. All others are discretionary with the court and upon terms fixed by the court, one of which conditions is the payment of the minimal docket fee of $20.00.[2]

It is here that the Ohio procedure differs from the Illinois procedure and distinguishes the instant case from the case of *Griffin v. Illinois*, 351 U. S. 12, most relied on by petitioner. Under the Illinois Criminal Code all appeals in felony cases are taken directly from the trial court to the Supreme Court (Ill. Rev. St. Ch. 38, Sec. 780½—Appendix B, p. 15). *Griffin* could not appeal unless he had a transcript. He had no money to procure a transcript and the court refused to furnish him one free. Accordingly, his indigency precluded him having an appeal.[3] We emphasize the article "an". It indicates one—not more than one.

In this instant case, Burns, the petitioner, had a transcript, and had his appeal. He was denied neither because of his poverty. The holding in *Griffin* was fully complied with. What he now complains of is that, because he could not comply with the rules of the Ohio Supreme Court and the statutes of Ohio relative to payment of a docketing fee, he could not have the decision on the

2. It should be noted that in 1953, when the First District Court of Appeals of Ohio considered Burns' case on appeal and affirmed the lower court, a Notice of Appeal to the Supreme Court was duly filed in the Court of Appeals and served upon the prosecuting attorney of Hamilton County as required by law. Sec. 2953.06, Revised Code—App. A. p. 11). However the appeal was abandoned by not filing the notice in the Supreme Court. At that time Burns had self-retained counsel and presumably was not indigent. In the 1957 attempted appeal to the Supreme Court, the statute requiring service of the Notice of Appeal on the prosecuting attorney was not complied with.

3. It is significant that in *Griffin*, the opinion of Mr. Justice Black, the concurring opinion of Mr. Justice Frankfurter, and the dissenting opinions of Mr. Justice Burton and Mr. Justice Minton, concurred in by Mr. Justice Reed and Mr. Justice Harland, refer throughout to *an* appeal, not to successive appeals.

appeal which was afforded him further reviewed, if the court chose to review it, by the highest court of the state. *Griffin* was denied the *only* appellate review available to him under Illinois law. Burns had the appellate review afforded him but was not satisfied with the outcome because it was adverse.

On page 18 of petitioner's brief it is stated:

> "It should be pointed out also that there is no basis to conclude that an application for an appeal by petitioner could only be based on untenable or frivolous grounds. The Court of Appeals of Hamilton County, Ohio, noted that in its opinion there were reasonable grounds for the appeal to it. It seems wholly likely, therefore, that, if accorded the opportunity, the petitioner will be able to show good cause for an appeal to the Supreme Court of Ohio."

No such inference should be raised by the finding of the Court of Appeals that "there were reasonable grounds for the appeal." This is a *pro forma* finding to save the appellant from being assessed damages and a fee for the appellee's counsel, as provided in section 2505.35, Revised Code of Ohio. (Appendix A, p. 12). The last sentence of this section of the Code provides:

> "If the appellate court certifies in its judgment that there was reasonable cause for the appeal, neither such fee, additional interest, nor damages shall be taxed, adjudged, or awarded.

The Equal Protection of the Laws Provision of the Fourteenth Amendment Does not Apply.

Burns, the petitioner, was not singled out by the clerk of the Supreme Court of Ohio and made subject to a condition for the filing of his Motion for Leave to Appeal not imposed on others. The requirement that a filing fee of Twenty Dollars be paid upon the docketing of such motion applies to all.

The leveling of varying degrees of economically resourceful defendants to a common plane so that none will have an advantage over another in a court of law, desirable as it may be, is a practically unattainable social goal. It would involve, among other things, the furnishing, at public expense, to all defendants in a criminal prosecution who claim to be indigent:

(1) Publicly employed counsel of skill, competence and experience, equal to that of counsel available by private employment to all other citizens at all stages of a criminal proceeding, from arrest forward.

(2) Investigating agencies equal in competence to those available to the nonindigent accused.

(3) Public relations counselors to create a favorable trial climate for the indigent defendant equal in competence to those available through private employment by the most affluent defendants.

(4) All costs of appeals, including filing cost, preparation, printing and filing of briefs, fees of counsel, stenographic services, and other expense *ad infinitum*.

(5) Cost of bail bonds so as not to be handicapped in his consultation with counsel as compared with his nonindigent counterpart able to furnish bail.

(6) Cost of procuring, subsisting, and compensating defense witnesses, including professional experts.

CONCLUSION

(1) In *Griffin* it is said that the refusal to furnish a free transcript of the proceedings in the trial court to an indigent defendant, when such transcript is essential to an appeal is a denial of rights under the Fourteenth Amendment. We agree.

(2) In the case at bar, Burns, the petitioner, *was* furnished a transcript of the record in the trial court. On

the basis of this transcript he appealed. His conviction was affirmed on appeal. At this point all of his constitutional rights were exhausted, unless he wished to contest the decision on the appeal of his case by a *second* appeal in the Supreme Court of Ohio, by leave of that court, and upon the payment of a docketing fee of $20.00. He did not seek this appeal until four years later, and then without the payment of the required docketing fee. At that time he applied for leave to appeal *in forma pauperis*. He did not comply with the statute on appeal in that he did not serve notice on the prosecuting attorney of the county wherein he was convicted. Section 2953.06, Revised Code. (App. A, p. 14.)

His application to appeal from the judgment of the Ohio Appellate Court affirming the judgment of conviction by the trial court filed *in forma pauperis* four years later, after the *Griffin* decision, was rejected as not in conformity with the statutes of Ohio or the rules of practice of the court.

(3) The *Griffin* case does not apply because:

(a) Burns had an appellate review.

(b) Burns was furnished a transcript of the record in the trial court for such appellate review.

(c) Burns was not denied due process of law or equal protection of the laws since the law and court rule applicable to him is applicable to all those who have had an appellate review and wish consideration for further review.

On the basis of the argument herein presented, respondent respectfully prays that this court find the interpretation given by the Supreme Court of Ohio to Section 2503.17 of the Revised Code of Ohio, and Rules VII and XVII of its Rules of Practice, do not violate the due process or equal protection clauses of the Fourteenth

Amendment of the Constitution of the United States and therefore that the action of that court in refusing to consider the motion for leave to appeal until payment of the fee was within their constitutional power.

Respectfully submitted,

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APPENDIX A

Page's Ohio Revised Code Annotated (1954)—
Title XXIII (23)
Courts—Common Pleas
Chapter 2301: Organization

• • •

Sec. 2301.23. Transcripts of testimony furnished party if requested.

"When shorthand notes have been taken in a case as provided in section 2301.20 of the Revised Code, if the court, either party to the suit, or his attorney, requests transcripts of any portion of such notes in longhand, the shorthand reporter reporting the case shall make full and accurate transcripts thereof for the use of such court or party. The court may direct the official shorthand reporter to furnish to the court and parties copies of decisions rendered and charges delivered by the court in pending cases."

Sec. 2301.24. Compensation for making transcripts and copies.

"The compensation of shorthand reporters for making transcripts and copies as provided in section 2301.23 of the Revised Code shall not be more than fifteen cents per folio of one hundred words, to be fixed by the judges of the court of common pleas. Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, and transcripts ordered by the court in either civil or criminal cases, and copies of decisions and charges furnished by direction of the court shall be paid from the county treasury, and taxed and collected as other costs. The clerk of the court of common pleas shall certify the amount of such transcripts or copies, which certificate shall be a sufficient voucher to the county auditor, who shall forthwith draw his

warrants upon the county treasurer in favor of such shorthand reporters."

Sec. 2301.25. Costs of transcript.

"When ordered by the prosecuting attorney or the defendant in a criminal case, or when ordered by the court of common pleas for its own use, in either civil or criminal cases, the costs of transcripts mentioned in section 2301.23 of the Revised Code, shall be taxed as costs in the case, collected as other costs, and paid by the clerk of the court of common pleas, quarterly, into the county treasury, and credited to the general fund. When more than one transcript of the same testimony or proceedings is ordered at the same time by the same party, or by the court, the compensation for making such additional transcript shall be one half the compensation allowed for the first copy, and shall be paid for in the same manner. All such transcripts shall be taken and received as prima-facie evidence of their correctness. When the testimony of witnesses is taken before the grand jury by shorthand reporters, they shall receive for such transcripts as are ordered by the prosecuting attorney the same compensation per folio and be paid therefor in the same manner provided in this section and section 2301.24 of the Revised Code."

Title XXV (25)

Courts—Appellate

Chapter 2505: Procedure on Appeals

• • •

Sec. 2505.35. Damages on appeal on questions of law.

"In an appeal on questions of law, when the judgment or final order is affirmed, or when such appeal is dismissed for want of prosecution, as part of the costs in the case there may be taxed a reasonable fee of not more than twenty-five dollars, to be fixed by the court, for the counsel of the appellee. The court may grant damages to the appellee in any reasonable sum not exceeding two hundred dollars, unless the judgment or final order of the trial court directs the

payment of money and execution thereof was stayed on appeal in the appellate court. If such execution was stayed on appeal, in lieu of such damages, the judgment or final order shall bear additional interest, at a rate not exceeding five per cent per annum, for the time it was stayed, to be ascertained and awarded by the court. If the appellate court certifies in its judgment that there was reasonable cause for the appeal, neither such fee, additional interest, nor damages shall be taxed, adjudged, or awarded."

Title XXIX (29)

Crimes—Procedure

Chapter 2945: Trial

• • •

Sec. 2945.69. Appointment of attorney by trial judge.

"The trial judge may appoint some competent attorney to argue the bill of exceptions against the prosecuting attorney or the attorney general under section 2945.68 of the Revised Code, and such appointee shall receive for his services a fee of not more than one hundred dollars, to be fixed by the judge and paid out of the treasury of the county in which the bill was taken. Such attorney shall file his brief against the prosecuting attorney or the attorney general within ten days after service upon him of the brief in support of said exceptions. The hearing of such cases shall have precedence of other business and such cases shall be continued upon the docket of the court of appeals or the supreme court until argued and submitted."

Chapter 2953: Appeals

Sec. 2953.04. Proceedings to review.

"Judgments and final orders are reviewed by appeal, instituted by filing notice of appeal with the court rendering such judgment or order and with filing a copy thereof in the appellate court where leave to appeal must be obtained. Upon filing the notice of appeal there shall be filed in the appellate court the transcript and original papers as provided in

section 2953.03 of the Revised Code. It is not necessary to include in the transcript of the record any bill of exceptions or objections, but the original bill of exceptions or objections may be attached in lieu of the transcript of the record thereof. The court in which the review is sought, by summary process, may compel a more complete record to be furnished, and such original papers to be forwarded. The brief of the appellant shall be filed with the transcript and shall contain the assignments of error relied on in such appeal. Within fifteen days thereafter, the appellee shall file its brief. All of such proceedings to review such judgments have precedence over all other cases in said reviewing court, and shall stand for hearing on the trial docket of said court from day to day until heard and submitted. Special statutes regulating appeals in particular cases are not affected by this section."

Sec. 2953.05. Appeal filed.

"Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after sentence and judgment. After thirty days from sentence and judgment, such appeal may be filed only by leave of the court or two of the judges thereof."

Sec. 2953.06. Notice of appeal served upon prosecuting attorney.

"Before the filing of a notice of appeal or a motion for leave where leave must first be obtained, a copy thereof must be served upon the prosecuting attorney. Notice of appeal shall contain a description of the judgment so as to identify it, and motions for leave to file shall state the time and place of hearing."

APPENDIX B

Smith-Hurd Illinois Annotated Statutes (1935):

Chapter 38—Criminal Code

Division XI—Writs of Error—New Trial

* * *

Sec. 780½. Appeals and writs of error—Jurisdiction of Supreme Court—Jurisdiction of Appellate Court.

"Appeals from and writs of error to Circuit Courts, the Superior Court of Cook County, the Criminal Court of Cook County, County Courts and City Courts in all criminal cases below the grade of felony shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanor, shall be taken directly to the Supreme Court."

SUPREME COURT OF THE UNITED STATES

No. 581.—October Term, 1958.

William W. Burns, Petitioner, v. State of Ohio,	On Writ of Certiorari to the Supreme Court of Ohio.

[June 15, 1959.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question presented in this case is whether a State may constitutionally require that an indigent defendant in a criminal case pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts.

After a trial in Ohio in 1953, the petitioner was convicted of burglary and sentenced to life imprisonment.[1] That same year his conviction was affirmed without opinion by the Ohio Court of Appeals, which permitted petitioner to proceed *in forma pauperis* in that court and provided him with a free copy of the transcript. Petitioner immediately filed a notice of appeal in the Court of Appeals but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme Court of Ohio.[2] To these papers petitioner attached an affidavit of poverty which declared that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this cause of action." He also attached a motion for leave to proceed *in forma pauperis*.

[1] Petitioner was also convicted of larceny and sentenced to a term of seven years to be served concurrently with the burglary sentence.

[2] Despite the passage of years the appeal was timely. *State* v. *Grisafulli*, 135 Ohio St. 87, 19 N. E. 2d 645.

The Clerk of the Supreme Court of Ohio refused to file the papers. He returned them with the following letter:

"This will serve to acknowledge receipt of your motion for leave to proceed in forma pauperis, motion for leave to appeal and notice of appeal.

"We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the Rules of Practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of a docket fee. For that reason we cannot honor your request.

"We are returning the above mentioned papers to you herewith." [3]

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[3] The Rules of Practice of the Supreme Court of Ohio obviously referred to in the clerk's letter are Rules VII and XVII.

§ 1512 (Rev. Code § 2503.17):

"The clerk of the supreme court shall charge and collect the following fees:

"(A) For each case entered upon the minute book, including original actions in said court, appeal proceedings filed as of right, . . . for each motion . . . for leave to file a notice of appeal in criminal cases . . . twenty dollars. . . .

"(B) For filing assignments of error . . . upon allowance of a motion for leave to appeal . . . five dollars. . . .

"Such fees must be paid to the clerk by the party invoking the action of the court, before the case or motion is docketed and shall be taxed as costs and recovered from the other party, if the party invoking the action succeeds, unless the court otherwise directs."

Rule VII:

"Section 1. *Felony Cases.* In felony cases, where leave to appeal is sought, a motion for leave to appeal shall be filed with the Clerk of this Court along with a copy of the notice of appeal which was filed in the Court of Appeals, upon payment of the docket fee required by Section 2503.17, Revised Code.

"Section 4. *Appeal as of Right.* In any criminal case, whether felony or misdemeanor, if the notice of appeal shows that the appeal

Under Art. IV, § 2, of the State Constitution, the Supreme Court of Ohio has appellate jurisdiction in many types of cases including those "involving questions arising under the constitution of the United States or of this state" and "cases of felony on leave first obtained." [4] Since burglary is a felony in Ohio,[5] the Supreme Court had jurisdiction to review petitioner's conviction and petitioner sought to file his motion asking leave to appeal.[6] The filing fee required by the Supreme Court on a motion for leave to appeal is $20 [7] and if that fee is paid, and the papers are otherwise proper, the motion will be considered with the possibility that leave to appeal will be granted.

We granted certiorari and leave to proceed *in forma pauperis*. 358 U. S. 919. Subsequently, an order was entered, 358 U. S. 943, expressly limiting the grant of

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involves a debatable question arising under the Constitution of the United States or of this state, the appeal may be docketed upon filing the transcript of the record and any original papers in the case, upon payment of the fee required by Section 2503.17, Revised Code."

Rule XVII:

"The Docket Fees fixed by Section 2503.17, Revised Code, must be paid in advance. . . ."

[4] See also Ohio Rev. Code §§ 2953.02, 2953.08, which implement this constitutional provision.

[5] See Ohio Rev. Code §§ 2907.09, 1.06, 1.05.

[6] In his notice of appeal filed in the Court of Appeals, petitioner stated "This appeal is on questions of law and is taken on condition that a motion for leave to appeal be allowed." But in the motion for leave to appeal to the Supreme Court, petitioner stated, among other contentions, that his conviction conflicted with his "Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article I, Section 10 of the Constitution of the State of Ohio." This might indicate that petitioner was claiming an appeal as of right to the Supreme Court. However, since petitioner has consistently characterised his appeal as one which requires leave, we so consider it here.

[7] See n. 3, *supra*.

certiorari to the question posed by petitioner in his *pro se* petition which is restated at the outset of this opinion.[8]

The State's commendable frankness in this case has simplified the issues. It has acknowledged that the clerk's letter to petitioner is "in reality and in effect" the judgment of the Supreme Court. Only recently, that court had occasion to comment on the function of its clerk in these words:

> "It is the duty of the clerk of this court, in the absence of instruction from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee."[9]

In a companion case, the court observed that its clerk "acts as the court in carrying out its instructions."[10] The State represented that the clerk had been instructed not to docket any papers without fees and also that the Supreme Court had not deviated from its practice in this respect. Moreover, the State asserted that it was impossible for petitioner to file any action at all in the Supreme Court without paying the fee in advance. There is no showing that these instructions have been modified or rescinded in any way and the Supreme Court has sanctioned the clerk's well-publicized procedure of returning

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[8] As posed by petitioner, the question was

"Whether in a prosecution for Burglary, the Due Process Clause, And The Equal Protection Clause, of the Fourteenth (14) Amendment to the United States Constitution, are violated by the refusal of the Supreme Court of Ohio, to file the aforementioned legal proceedings, because Petitioner was unable to secure the costs."

[9] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 176, 177, 128 N. E. 2d 110.

[10] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 174, 175, 128 N. E. 2d 108, 109.

pauper's applications, without exception, with the above-quoted form letter. This delegation to the clerk of a matter involving no discretion clearly suffices to make the clerk's letter a final judgment of Ohio's highest court, as required by 28 U. S. C. § 1257.

Although the State admits that petitioner "in truth and in fact" is a pauper, it presses several arguments which it claims distinguish *Griffin* v. *Illinois*, 351 U. S. 12, and justify the Ohio practice. First, the State argues that petitioner received one appellate review of his conviction in Ohio with *in forma pauperis* benefits, while in *Griffin*, Illinois had left the defendant without any judicial review of his conviction. This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. 351 U. S., at 18, 22. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

Since *Griffin* proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, 351 U. S., at 13, Ohio seeks to distinguish *Griffin* on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of *Griffin*. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits his application for leave to appeal from a felony conviction. But as that court has interpreted § 1512 and its rules of practice, an indigent defendant is denied that opportunity. There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other

defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin*, the defendant might have raised to the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.

What was said in *Griffin*, might well be said here: "We are confident that the State will provide corrective rules to meet the problem which this case lays bare." 351 U. S., at 20.[11]

The judgment below is vacated and the cause is remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

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[11] Shortly after this Court's decision in *Griffin* v. *Illinois*, *supra*, the Illinois Supreme Court promulgated Rule 65–1, which provides in part that any person sentenced to imprisonment who is "without financial means with which to obtain the transcript of the proceedings at his trial" will receive a transcript if it is "necessary to present fully the errors recited in the petition. . . ."

SUPREME COURT OF THE UNITED STATES

No. 581.—October Term, 1958.

William W. Burns, Petitioner, v. State of Ohio.	On Writ of Certiorari to the Supreme Court of Ohio.

[June 15, 1959.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, dissenting.

It is the special obligation of this Court strictly to observe the limits of its jurisdiction. No matter how tempting the appeal of a particular situation, we should not indulge in disregard of the bounds by which Congress has defined our power of appellate review. There will be time enough to enforce the constitutional right, if right it be, which the Court now finds the petitioner to possess when it is duly presented for judicial determination here, and there are ample modes open to the petitioner for assertion of such a claim in a way to require our adjudication.

The appellate power of this Court to review litigation originating in a state court can come into operation only if the judgment to be reviewed is the final judgment of the highest court of the State. That a judgment is the prerequisite for the appellate review of this Court is an ingredient of the constitutional requirement of the "Cases" or "Controversies" to which alone "The judicial Power shall extend." U. S. Const., Art. III, § 2. That it be a "final judgment" was made a prerequisite by the very Act which established this Court in 1789. Act of September 24, 1789, § 25, 1 Stat. 85, now 28 U. S. C. § 1257. "Close observance of this limitation upon the Court is not regard for a strangling technicality." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67. Such has been the unde-

viating constitutional, legislative and judicial command binding on this Court and respected by it without exception or qualification to this very day.

The requisites of such a final judgment are not met by what a state court may deem to be a case or judgment in the exercise of the state court's jurisdiction. See *Tyler* v. *Judges*, 179 U. S. 405; *Doremus* v. *Board of Education*, 342 U. S. 429. Nor can consent of the parties to the determination of a cause by this Court overleap the jurisdictional limitations which are part of this Court's being. Litigants cannot give this Court power which the Constitution and Congress have withheld. *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382. The President of the United States himself cannot secure from this Court determination of a legal question except when such a question duly arises in the course of adjudication of a case or controversy, even though he asks for needed help in a great national emergency. See President Washington's questions in 33 Writings of Washington (Fitzpatrick ed. 1940) 15–19, 28, and the correspondence between Secretary of State Thomas Jefferson and Chief Justice Jay, in 3 Correspondence and Public Papers of John Jay (Johnston ed. 1891) 486–489.

As the importance of the interrogator and the significance of the question confer no power upon this Court to render advisory opinions, a compassionate appeal cannot endow it with jurisdiction to review a judgment which is not final. One's sympathy, however deep, with petitioner's claim cannot dispense with the precondition of a final judgment for exercising our judicial power. If the history of this Court teaches one lesson as important as any, it is the regretful consequences of straying off the clear path of its jurisdiction to reach a desired result. This Court cannot justify a yielding to the temptation to cut corners in disregard of what the Constitution and Congress command. Burns has other paths to this

Court to assert what, forsooth, all of us may deem a failure by Ohio to accord him a constitutional right—other paths besides our indifference to the rules by which we are bound. Specifically, he has four obvious remedies for securing an ascertainment and enforcement of his constitutional claim by this Court without having this Court treat the letter of a clerk of a court as a court's judgment. For although the caption of the case would indicate that our review was of the Supreme Court of Ohio, in fact the review can only be of the refusal of the clerk of that court to docket petitioner's papers until a twenty-dollar docket fee was paid. The Supreme Court of Ohio was not asked to consider the appeal, nor did it itself refuse to do so. The decisions in *State ex rel. Dawson* v. *Roberts*, 165 Ohio St. 341, 135 N. E. 2d 409, and *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 174 and 176, 128 N. E. 2d 108 and 110, mandamus denied *sub nom. Wanamaker* v. *Supreme Court of Ohio*, 350 U. S. 881, demonstrate conclusively that the Ohio court has retained the ultimate power to determine what papers will be permitted to be filed. There is not the remotest indication in the record that this petitioner's claim to file his appeal without paying the customary filing fee, because of indigence, was brought to the attention of the Ohio Supreme Court, nor is there any showing in the record that in writing his letter the clerk was acting at the specific behest of that court in this case.

(1) Petitioner may make a direct application addressed in terms to the judges of the Supreme Court of Ohio. Such applications informally expressed by way of letters are frequently addressed to this Court, and are accepted here as the basis for judgments by this Court. We are not to assume that an application so addressed to the judges of the Ohio Supreme Court will not be transmitted to that court and acted upon by it. This is not merely an appropriate assumption about the functioning of

courts. It is an assumption one can confidently make based upon the records in this Court. See *Wanamaker* v. *Supreme Court of Ohio, supra.* (Papers filed here in connection with the *Wanamaker* case make it clear that the Supreme Court of Ohio does consider letters asking that that court instruct its clerk to accept petitions for filing.) The Supreme Court of Ohio might well yield to this claim of Burns as other courts in like situations have yielded since *Griffin* v. *Illinois,* 351 U. S. 12. But in any event, a denial of Burns' application or refusal to entertain it would constitute a judgment of that court as an appropriate prerequisite for review here.

(2) Ever since § 13 of the Act of 1789, 1 Stat. 81, as amended, 28 U. S. C. § 1651, this Court has had power to issue mandamus in protection of its appellate jurisdiction in order to avoid frustration of it. This is an exercise of anticipatory review by bringing here directly a case which could be brought to this Court in due course.

(3) Under the Civil Rights Act, R. S. § 1979, 42 U. S. C. § 1983, Burns, like others before him who have allegedly been denied constitutional rights under color of any statute of a State, may have his constitutional rights determined and, incidentally, secure heavy damages for any denial of constitutional rights. See *Lane* v. *Wilson,* 307 U. S. 268.

(4) Burns' claim, in essence, is unlawful detention because of a denial of a constitutional right under the Fourteenth Amendment. That lays the foundation for a habeas corpus proceeding in the United States District Court. See *Johnson* v. *Zerbst,* 304 U. S. 458. To be sure, if the right he claims be recognized in habeas corpus proceedings, he would not be released as a matter of course but merely conditionally on the State Supreme Court's entertaining his petition for review as an indigent incapable of meeting court costs. The contingent nature

of the release would not impair the availability of habeas corpus. See *Chin Yow* v. *United States*, 208 U. S. 8.

Thus, it cannot be urged that necessity compels what the Constitution and statutes forbid—adjudication here of a claim which has not been rejected in a final judgment of a state court. Adherence to the dictates of the laws which govern our jurisdiction, though it may result in postponement of our determination of petitioner's rights, is the best assurance of the vindication of justice under law through the power of the courts. We should dismiss the writ of certiorari inasmuch as there has been no final judgment over which we have appellate power.